

U.S. DEPARTMENT OF TRANSPORTATION
OFFICE OF HEARINGS
WASHINGTON, DC

IN THE MATTER OF

TRANSLAND, INC., BRIAN WILLSON
CHARLES ROBERTS, CHRISTOPHER
CARTER, JAMES DEJONGE, MICHAEL
SLAUGHTER, ALFONSO GONZALES

Respondents

Docket Nos. FMCSA-2006-25348, 25349,
25350, 25351, 25352, 25353, and 25354
(Federal Motor Carrier Safety Administration)

REPLY BRIEF OF TRANSLAND, INC.

The Field Administrator's ("FA") Post-Hearing Brief contains a number of assertions that require correction. At the outset he claims that each of the charges in this proceeding are based on discrepancies between entries that Transland drivers made on their logs, or records of duty status ("RODS"),

"and a Global Positioning System ("GPS") position history obtained by the FMCSA Safety Investigator, Garth Lantz ("SI Lantz"), from Transland during the course of the investigation. The GPS position histories were generated using a product called MobileMax, and provided to SI Lantz in response to an administrative subpoena."

The so-called GPS data was produced, not in response to a subpoena, but in response to a simple request from Mr. Lantz. The subpoena was issued only after Transland management objected to the printed data being removed from the premises. The misstatement is repeated in a footnote on page 12 of the FA's brief:

The GPS records were provided by Transland in response to an administrative subpoena, which directed Transland to produce “[a]ll Mobile MAX Global Position System records” for a list of drivers and date ranges.

The falsity of the FA’s argument is compounded in the same footnote:

During the deposition of Thomas Cuthbertson, the Field Administrator discovered that Transland did not fully comply with the administrative subpoena, based on Mr. Cuthbertson’s deposition testimony that the MobileMax system included “validity codes,” and that the Mobile Max records provided to the Field Administrator by Transland were missing the validity codes. (FA Ex. 135). Validity codes, which are included with the Mobile Max GPS records owned by Transland, are used to determine the number of satellites communicating with the GPS receiver, and thus the degree of accuracy of the position report. (FA Ex. 135). Because Transland did not provide the validity codes to SI Lantz, the Field Administrator retained the services of Dennis McGee to determine the accuracy of the MobileMax GPS position histories.

The FA dissimulates. In fact, the FA’s witness, Mr. Cuthbertson, did not testify that the validity codes were part of the GPS records owned by Transland. He testified, rather, that the validity codes were not even on premises controlled by Transland. The validity codes were only available on premises owned by Mr. Cuthbertson’s employer, Xata Corporation, located in Joplin, Missouri. (404, 406.)¹

Jerry Vanarsdall, Transland’s information technology manager, provided the data that the FA complains did not include the validity codes the FA claims were required by the subpoena. However, when Vanarsdall provided the data, no subpoena had been issued. Furthermore, in his testimony Mr. Vanarsdall said he never heard of validity codes before Mr. Cuthbertson’s deposition. (662)

There is agreement that Transland is liable for violations only if it knew or should have known of the log falsifications on the basis of information in Transland’s possession. However, an indispensable predicate is that the logs were, in fact, false. The FA has not produced admissible, clear, credible, and convincing evidence that any log was false.

¹ Numbers in parenthesis refer to pages in the hearing transcript.

The FA relies heavily on his proffered expert, Dennis McGee, whom he claims to have been obliged to call because of Transland's failure to produce validity codes over which it had no control and the existence of which it was unaware.

The FA's only evidence is a collection of documents, such as FA Exhibit 11, that contain what is represented to be truck position locations that conflict with entries on drivers' logs. Mr. Lantz, who obtained the documents did not know where they came from, who prepared them or how they were prepared. (188, 192, 201.) The documents were given to him in response to his demand for MobileMax GPS data.

Mr. McGee based his testimony on those documents. During McGee's testimony, Mr. Bell, the FA's attorney, said, "[T]he first question is whether the documents can either be, are even accurate, and that's what Mr. McGee" Mr. McGee testified that the documents are not reliable for supporting the charges in the Notice of Claim. (229, lns. 1-5.) He said that GPS position information requires reporting from at least three satellites to be considered accurate. (60 lns. 1 & 2, 64 ln. 7)

Mr. McGee does not know how many functions MobileMax can perform. (73, lns.19-21.) MobileMax could not be manipulated or configured to tell whether logs were false. (74, lns. 20-22; 75, ln. 2.) At page 204 FA's counsel asked Mr. McGee to look at FA Exhibit 11. McGee was asked whether there was any way to verify the position reports as accurate from the document. McGee said he could not, because he did not know how many satellites were reporting for any particular location report. If there were only two satellites involved, the position report would not be valid. (265, lns. 16-19.) That would appear to mean that all the position reports were unreliable. He testified the entire list could be off by one hundred miles.

(235, lns. 14–17; 241.) McGee also would agree with Mr. Cuthbertson that the data could be off by more than 15 minutes.

At page 261 C.J. Yoder asked Mr. McGee whether he agreed with Mr. Cuthbertson's deposition testimony that MobileMax was not designed to audit drivers' logs. Mr. McGee said that he disagreed with that testimony. On questioning by the Judge he acknowledged his earlier testimony that he had read Mr. Cuthbertson's deposition, and that there was nothing with which he disagreed. (262.)

Beginning at page 205, the expert witness testified how he extrapolated from the position locations on the FA's exhibits, that were acknowledged by the FA's witnesses to be not accurate, unreliable and not valid, using maps from Google and another source, to establish that the logs alleged to be false were indeed false, and that, presumably, Transland should have known that. The reliability of the maps was not established. The exercise was an example of the data processing axiom, "garbage in, garbage out." Mr. McGee cannot qualify as an expert witness. His testimony had no probative value; it did not support the charges.

At page 21 of his brief the FA states:

Transland also had the ability to detect hours of service violations by its drivers, because a comparison of the MobileMax records in Transland's possession to other records in its possession would have led to the discovery of the violations.

There is no reference to the record to support that statement. It is not supported by the record.

In his testimony, Mr. Lantz acknowledged that, before requesting GPS data, FMCSA policy requires that he evaluate the carrier's system for using hard copy supporting documents to check logs. If the carrier's capability appears sufficient to demonstrate compliance, GPS records would not be routinely sought in the CR. (481 lns 9 – 15.)

In response to a question from C.J. Yoder, Jerry Vanarsdall described Transland's system for checking logs. All logs were scanned into a device using software called "Keller Scan." All T-Check fuel stops would be imported into the system and compared with the logs. The safety department would compare all paperwork produced by a trip, such as bills of lading, toll receipts and scale tickets with the log that had been scanned. The safety department would visually verify that the logs were either correct or incorrect. The log clerk did most of this work. Every document the driver brought in was used. (680 – 694.) "They would pull up each driver and look at this information, make sure that they were where they said they were, the correct duty status." (687.)

On page 497 Mr. Lantz testified that the ineffectiveness of Transland's method for checking logs was irrelevant to his request for GPS records. In response to a question by C.J. Yoder, Lantz said the only reason for requesting GPS data was that he was investigating a fatal accident involving one driver. He then used the GPS data to discover violations by all the drivers audited in the CR. They all are represented in charges in the notice of claim.

Use of GPS data, as described by the FA's principal witness violated published FMCSA policy. For that reason, in addition to the lack of evidence disclosing its source and its questionable reliability, the evidence should not be considered and the charges dismissed.

The FA sees some significance to his case against Transland in the fact that, on March 20, 2009, C.J. Yoder issued an order to the effect that the six drivers, who had each been charged with one false log, had admitted the facts in the FA's requests for admissions to which the drivers had not responded.

On page 15 the FA asserts that fifty of the one hundred and eighteen charges against Transland were admitted by the drivers. Six drivers were charged with one count each.

Transland had been paying for their defense. In July 2008 they were served with requests for admissions. It appeared that defense costs could become prohibitive in light of the penalty assessment of \$200 per driver. In August 2008 the penalties were paid. Thereafter, a motion to dismiss was filed and counsel withdrew.

It would be a denial of due process of law, guaranteed by the Constitution, to construe the deemed admissions by the drivers of the facts stated in the requests for admissions as evidence that Transland knew or should have known the truth of unproven charges against the carrier.

The agency decisions relied on by the FA are designated by citations to WestLaw. Most trucking companies do not have access to that resource. In order to assure that those who are subject to regulation by the government be able to defend themselves, Congress enacted a statute requiring that agencies maintain an index of its decisions and publish them.

The decisions referred to in the FA's brief naturally support his claim. The lack of a statutorily required index makes it impossible for a respondent to do a subject matter search for contrary precedents.

A final order, opinion . . . that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party ... only if – (i) it has been indexed and either made available or published as provided by this paragraph.

See 5 U.S.C. §552(a)(2)(E). In order to have vitality, laws must either be obeyed or enforced.

The FMCSA does not maintain the required index.

The cases cited by the FA generally stand for the proposition that carriers must use information to which they have access to check drivers' logs. On page 24 of his brief the FA cites *Arctic Express, Inc. v. Department of Transportation*, 12 F. Supp. 2d 723, 727 (S.D. Ohio 1996) in which satellite tracking records are described as "invaluable" for determining the validity of drivers logs. The Court enforced a subpoena for documents containing tracking data.

The FA does not disclose, however, the relevant comment by the Court of Appeals in *Arctic Express*. It is an unpublished opinion, but an opinion of which surely the agency is aware since it was a party. The Court of Appeals for the Sixth Circuit said,

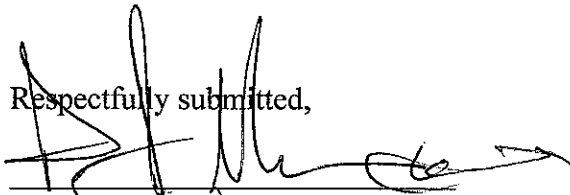
The subpoena never required Arctic to keep electronic records in the future; instead, the subpoena asks only for records 'generated in the ordinary course of business.' Arctic must produce all Qualcomm reports that it has or routinely keeps, but it need not compile any additional Qualcomm reports solely to comply with the subpoena.

Arctic Express, Inc. v. Department of Transportation, 134 F.3d 370 (Table), 1997 WL 809981 at *2 (6th Cir. 1997). Attorneys are obliged to bring such matters to the attention of the forum.

CONCLUSION

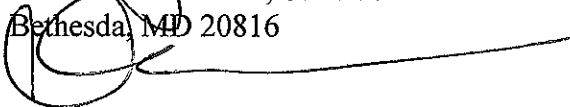
The charges remain unsupported. The Notice of Claim should be dismissed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that on the 7th day of July 2009, the undersigned mailed or delivered, as specified, the designated number of copies of the foregoing document to:

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